In the Supreme Court of the United States

Supreme Court, U. S.
FILED
MAY 31 1977
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1976

No. 76-1527

ROBERT L. CHESNEY,

Petitioner,

vs.

STATE CONTROLLER, STATE OF CALIFORNIA, COUNTY OF MERCED, LYNN GRESHAM as Tax Collector of the County of Merced, and DAVID R. HUDGINS as Assessor of the County of Merced,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California Fifth Appellate District

Brief for Respondents in Opposition

EVELLE J. YOUNGER
Attorney General

CHARLES C. KOBAYASHI
Deputy Attorney General
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 445-5035

Attorneys for Respondent State Controller, State of California

RUSSELL M. KOCH
Merced County Counsel
BLAIR H. CHECKETTS
Deputy County Counsel
2222 M Street
Merced, California 95340
Telephone: (209) 726-7564

Attorneys for Respondents County of Merced, Lynn Gresham and David R. Hudgins

BORG PRINTING COMPANY OF CALIFORNIA, 548 FIRST STREET, SAN FRANCISCO 94105

TABLE OF CONTENTS

		Page
I.	Jurisdiction	1
II.	Question Presented	2
III.	Constitutional Provisions and Statutes Involved	2
IV.	Statement of the Case	2
V.	Argument	3
	A. Petitioner Has Not Been Deprived of Due Process of Law	3
	1. California Revenue and Taxation Code Provides the Sole and Complete Procedure for the Assessment and Collection of Property Taxes	4
	2. The Procedures Followed by the Respondents Have Been Shown by Experience to Give Reasonable Notice of Impending Interference With Petitioner's Ownership or Possession	5
	3. The Principal Case Relied Upon by Petitioner Is Inapposite	9
	4. *Mitchell* v. *W. T. Grant,* 416 U.S. 600 (1974) Has Established the Balancing Test As a Criteria for Procedural Due Process Cases	11
	B. The Petitioner Had Actual Knowledge That Not Only Were Taxes Falling Due With a Possible Loss of the Real Property for Failing to Pay Taxes, But He Had Actual Knowledge That the Property Was to Be Sold at a Tax Sale	12

Pages

C. This Case Does Not Warrant Review by This Court 13

VI. Conclusion 14

Appendix A 1

Appendix B 13

Appendix C 17

Appendix D 19

TABLE OF AUTHORITIES

Pages

Fox v. Wright, 152 Cal. 59 (1907) 12

Fuentes v. Shevin, 407 U.S. 67 (1972) 11

Johnson v. Alma Investment Co., 47 Cal.App.3d 155 (1975) 9, 10

Johnson v. Mock, 19 Ariz.App. 283 (1973) 13

McMaster v. City of Santa Rosa, 27 Cal.App.3d 598 (1972) 7, 8, 9

Mercury Herald Co. v. Moore, 22 Cal.2d 269 (1943) 5, 12

Milliken v. Meyer, 311 U.S. 457 (1940) 3

Mitchell v. W. T. Grant, 416 U.S. 600 (1974) 11

Mullane v. Central Hanover Tr. Co., 339 U.S. 306 (1950) 3

North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925) 3, 4

Ponder v. Ebey, 152 P.2d 268 (1944) 13

Rogers v. Dent, 239 S.W. 1074 (1922) 13

Sears v. County of Calaveras, 45 Cal.2d 518 (1955) 10

Security Bank v. California, 263 U.S. 282, 288 (1923) .. 3

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 11

CALIFORNIA STATUTES AND CODES	Pages
California Revenue and Taxation Code,	
§§ 2605	4
2606	4
2617	4
2618	4
3362	5
3365	3, 6
3436	4
3511	5
3517	5
3518	5
3701	3, 6
3711	6
California Validating Act	8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1527

ROBERT L. CHESNEY,

Petitioner,

vs.

STATE CONTROLLER, STATE OF CALIFORNIA, COUNTY OF MERCED, LYNN GRESHAM as Tax Collector of the County of Merced, and DAVID R. HUDGINS as Assessor of the County of Merced,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California Fifth Appellate District

Brief for Respondents in Opposition

I.

JURISDICTION

The technical jurisdiction requirements appear to be set forth adequately in the petition. It is to be observed, however, that petitioner's contentions were rejected by the courts of the State of California based upon and in conformity with the pertinent decisions of this Court and the California courts.

II.

QUESTION PRESENTED

Whether the requirements of due process of law have been met by the procedures of the California taxing authorities in selling petitioner's real property for his failure to have paid taxes on real property for a period in excess of six years under the circumstances of this case where petitioner knew that real property taxes had not been paid and knew that the property was being put up for sale for dilinquent taxes.

III.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Revenue and Taxation Code are set forth in Appendix "B."

The pertinent provisions of the California Validating Act are set forth in Appendix "D."

IV.

STATEMENT OF THE CASE

Petitioner commenced this action on January 27, 1975, by filing an original complaint, followed by a first and then a second amended complaint, to set aside a tax sale of real property.

Petitioner's second amended complaint alleged the denial of due process on account of the alleged failure to have received notice of the tax delinquency and subsequent sale of the real property, either by mail, in person or otherwise.

On December 23, 1975, defendants filed their motion for summary judgment on the ground that petitioner's lack of due process argument was without legal merit. Defendants further contended that the due process requirement was met by their compliance with the notice requirements of

Revenue and Taxation Code sections 3365 and 3701. On January 26, 1976, after oral argument and the submission of written briefs, the court issued its ruling granting defendants' motion for summary judgment and dismissed petitioner's second amended complaint. The judgment of summary judgment was entered on January 28, 1976.

Petitioner then timely filed an appeal to the Court of Appeal of the State of California which then filed its opinion affirming the trial court's judgment for summary judgment. The petitioner's application for a hearing before the California Supreme Court was thereafter denied.

V.

ARGUMENT

A. Petitioner Has Not Been Deprived of Due Process of Law.

This case was correctly decided in accordance with the criteria and standards established by the United States Supreme Court in *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314 (1950), *Milliken v. Meyer*, 311 U.S. 457, 463 (1940), and other cases involving an issue similar to that present here.

The determination as to whether or not due process of law was afforded a person depends upon whether or not the action taken was just and appropriate under the circumstances. *Security Bank v. California*, 263 U.S. 282, 288 (1923). Notice by publication is sufficient in many situations. *Milliken v. Meyer, supra*, 311 U.S. 457. Notice by publication is sufficient as to a beneficiary whose interest or address is unknown. *Mullane v. Central Hanover Tr. Co., supra*. The proper method of furnishing notice depends upon each situation. As this Court stated in *North Laramie Land Co. v. Hoffman*, 268 U.S. 276 (1925):

> ". . . it has uniformly been held that statutes providing for taxation or condemnation of land may adopt a procedure summary in character, and that notice of such proceedings may be indirect, provided only that the period of notice of the initiation of proceedings and the method of giving it are reasonably adapted to the nature of the proceedings and their subject matter and afford to the proper owner reasonable opportunity at some stage of the proceedings to protect his property from an arbitrary or unjust appropriation. (Citations.)" *Id.* at 283.

We will now demonstrate that the petitioner herein not only was accorded with the constitutional requisites of due process, he also had actual knowledge of his delinquency and the fact that his property was being put up for sale.

1. CALIFORNIA REVENUE AND TAXATION CODE PROVIDES THE SOLE AND COMPLETE PROCEDURE FOR THE ASSESSMENT AND COLLECTION OF PROPERTY TAXES.

Very briefly the assessment and collection of California property taxes operate in the following manner:

One-half of all real property taxes is due on November 1 and it becomes delinquent on December 10 of each year, and the remaining one-half is due on February 1 and becomes delinquent on April 10 of each year (Revenue and Taxation Code §§ 2605, 2606, 2617 and 2618). (All references hereinafter will be to the Revenue and Taxation Code unless otherwise specified.)

When taxes on delinquent property become delinquent, a notice of intention to sell is prepared on or before June 8 of each year, and the notice advises that the property in question will be sold to the state if the taxes are not paid (section 3436).

Then a sale of the property is made to the state on or before June 30, after which the taxpayer must redeem the

property within five years from June 30 of the year of the sale.

If the taxes are not then paid within the five-year period, the property is deeded to the state after compliance with certain statutory notice requirements (section 3362 et seq.).

After the property is deeded to the state, then that property becomes tax-deeded property (section 3511) owned by the State of California.

The effect of the deed to the state is that the deed constitutes prima facie evidence that the property was assessed pursuant to law, that the taxes were levied in accordance with law, that taxes were not paid, that the property was sold to the state in accordance with the law, that the property was not redeemed, and that all procedural steps were followed pursuant to law (section 3517). The deed is conclusive evidence of the regularity of all proceedings from original assessment to the execution of the deed except for actual fraud (section 3518). Thus, once the property is deeded to the state, the owner of that property loses all his rights in that property except the right to redeem it at any time prior to the state's disposition of it or the state's acquiring title to itself in the land. *Mercury Herald Co. v. Moore*, 22 Cal.2d 269 (1943). Once the property is deeded to the state, the taxpayer has only a conditional right to redeem that property until the state makes a valid sale of the property to a bona fide purchaser. Once this sale takes place the right of redemption is forever lost.

2. THE PROCEDURES FOLLOWED BY THE RESPONDENTS HAVE BEEN SHOWN BY EXPERIENCE TO GIVE REASONABLE NOTICE OF IMPENDING INTERFERENCE WITH PETITIONER'S OWNERSHIP OR POSSESSION

The only requirement that the code places on the tax collector concerning notice of intent to deed to the state in

the sale of the property by the state to a private purchaser is that it be mailed to his last known address.

Revenue and Taxation Code section 3365 provides in relevant part as follows:

> "[T]he tax collector shall make a reasonable effort to ascertain the address of the last assessee of the tax-sold property, including, but not limited to, an examination . . . of the assessment of this property on the rolls beginning with the year of delinquency to and including that of the last equalized roll and examination of the most recept telephone books in the county in which the tax-sold property is located, and an examination of the telephone book covering the area of the last known address of the last assessee.
>
> "*The failure of the tax collector to make a reasonable effort to ascertain the address of the last assessee as required by this section shall not affect the validity of the deed to the state.*" (Emphasis added.)

Similarly, Revenue and Taxation Code section 3701 provides in part as follows:

> ". . . .
>
> "The failure of the tax collector to make a reasonable effort to ascertain the address of the last assessee as required by this section shall not affect the validity of the sale."

As appears above, both sections 3365 and 3701 provide that the tax collector shall make a reasonable effort to ascertain the address of the last assessee. Failure to make that effort does not affect the validity of the transfer. In the absence of fraud, the burden imposed by section 3711 cannot be circumvented.

The procedure followed by the respondent County of Merced has been shown by experience to give reasonable notice of impending interference with petitioner's owner-

ship or possession of real property. The very recent case of *McMaster v. City of Santa Rosa*, 27 Cal.App.3d 598 (1972), decisively answered a due process question by holding that even though no notice of any nature whatsoever was sent to the taxpayers regarding the intended sale, the publication of said notice was all the due process notice to which the delinquent taxpayers were entitled. In the present case not only were the notices actually published and sent to the petitioner at the last known address, the petitioner herein admitted at his deposition that he had actual notice at least three days prior to the date of the sale (Appendix "C-1,2"). The petitioner furthermore admitted that he did not take any action by relying upon the advice of his attorneys that the property could not be sold unless he actually received written notice (Appendix "C-2"). Thus, all the more reason that the *McMaster* case is determinative of the issue in this matter. The court left no doubt as to the due process question in these words:

> "(2) It is, of course, elementary, that, although it is a matter of common knowledge that failure to pay property taxes can result in penalties, including loss of property, the property may not be taken from its owner without the process of law. The fundamental requisite of due process is *notice*, reasonably calculated, under all the circumstances, to apprise the interested parties of the pendancy of the action and to afford them opportunity to be heard (*Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314 [94 L.Ed. 865, 873, 70 S.Ct. 652]; *Milliken v. Meyer* (1940) 311 U.S. 457, 463 [85 L.Ed. 278, 283, 61 S.Ct. 339, 132 A.L.R. 1357]). While there is no constitutional mandate which makes specific how that notice is to be given or which form it must take, the questions of notice and due process are so inextricably part and parcel of each other that *there can be no due process*

without the sovereign following some procedure which, according to common experience, should reasonably give notice to impending interference with ownership or right of possession. (*Litchfield v. County of Marin* (1955) 130 Cal.App.2d 806, 813 [280 P.2d 117].) (Emphasis supplied.)

"(3) The cases make it explicit that the notice required by statute in tax sale proceedings is designed to afford the property owner protection and enable him to pay taxes *before the title passes from him* (*Sawyer v. Berkeley Securities Co.* (1929) 99 Cal.App. 545, 548 [279 P. 217]). Based upon this premises, it has been held that, *where the taxing power has acquired private property by due process of law and the title has passed to the state, the state may, without violating any rights or due process, sell the property without giving notice to the individual owner at all, or may give such notice as, in its discretion, seems proper* (*Fox v. Wright* (1907) 152 Cal. 59 [91 P. 1005]; 47 Cal.Jur.2d, § 321, pp. 65-66)." (Emphasis supplied.) *Id.* at 601-602.

Moreover, any alleged defects were cured by the California Validating Act (Appendix "D"). In *McMaster v. City of Santa Rosa, supra,* the court stated that publication of notice is all due process notice to which the taxpayer is entitled and that, "As far as mailing additional notices of sale prior to the sales to and from the State, or the mailing of any additional notices at all is concerned, such notices could have been done away with or not required by the legislature in the first instance without doing violence to due process." *Id.* at 605. Furthermore, in *McMaster* the court stated that the Validating Act enacted by the Legislature corrected the defect. In the matter under consideration here, the Legislature also passed an act validating (Appendix "D") the acts of the taxing agencies in their

offices. That act validates technical or procedural errors or omissions in the functions of the taxing agencies. It provides that every act and proceeding heretofore taken by any taxing agency in the assessment or equalization of property or to the levy of taxes thereon, or the tax sales or certificates of tax sales, tax deeds of other abeyances, are confirmed, validated and declared legally effective.

Accordingly, in applying the holding of *McMaster v. City of Santa Rosa, supra,* to our situation, we can only conclude that the instant Validating Act corrected any defect which may have occurred in connection with the tax sale of the property formerly owned by the petitioner herein.

3. THE PRINCIPAL CASE RELIED UPON BY PETITIONER IS INAPPOSITE

Petitioner here appears to rely to a great extent upon the single case of *Johnson v. Alma Investment Co.,* 47 Cal.App.3d 155 (1975), in a misconceived effort to draw an analogy between the facts of the *Johnson* case and the instant matter. The Fifth District Court of Appeal, which affirmed the trial court decision in the instant matter, and which also decided *Johnson v. Alma Investment Co., supra,* correctly distinguished the latter from the case at bar because *Johnson* involved an irregular assessment by a local water storage district. As the court stated:

> ". . . Unlike the annually assessed ad valorem property tax, there was no reason for the property owners in *Johnson* to be on guard to protect their interest. Consequently, this court held that due process was not satisfied in the water storage district's failure to utilize the address of the property owner which was readily available from both the tax assessor and the tax collector to provide direct mail notice. Footnote 3, page 160, of the *Johnson* opinion implicitly supports the very distinction here made between the *Johnson* situation and the case at bar." Appendix "A-12-13."

Moreover, a careful analysis of *Johnson* will disclose several key factors which distinguish it from the case at issue. First of all, there the correct address of the taxpayer was shown both on the records of the county tax assessor and the tax collector, while such was not the case here. Secondly, the California Water Code provisions which permitted the sale of delinquent water assessment properties were held to be constitutionally defective because one section permitted publication of notice *even when* the correct address was known, while the Revenue and Taxation Code required sending of notice *if* the correct address is known. Thirdly, those Water Code provisions do not have any of the procedural protection extending over at least six years as afforded by the Revenue and Taxation Code, described in detail hereinabove.

Here, we have a different type of proceeding. The California property tax is a tax against the real property itself. No one is personally liable for it. It is a limitation on the property right itself which is a creature of state law. The provisions of the California Revenue and Taxation Code which require payment of the tax are an integral part of the right to own property. The real property tax is an *in rem* tax—a burden laid against the property itself—to pay for government benefits given to the property, its owners and its users by the county government. Payment of real property tax is a burden on the property itself and in effect payment thereof is a condition of continued ownership and use. After five years of delinquency, the property then reverts to state ownership, until the delinquent taxes are paid. *Sears v. County of Calaveras,* 45 Cal.2d 518, 522 (1955), *appeal dismissed,* 351 U.S. 959.

Furthermore, in the matter at hand, not only was the petitioner capable of understanding the tax procedures, he

in fact knew that a tax sale of his property was going to take place. Yet, he elected to rely upon the advice of his attorneys that his property could not be sold unless he actually received written notice personally.

Due process is not an abstract concept of constitutional law that permits a knowledgeable person from failing to take any steps which may prevent detrimental action from being taken against him. Due process does not protect a person from a deliberate failure to take action which could have prevented future harm.

4. MITCHELL V. W. T. GRANT, 416 U.S. 600 (1974), HAS ESTABLISHED THE BALANCING TEST AS A CRITERIA FOR PROCEDURAL DUE PROCESS CASES.

We recognize that the concept of due process not only is a constantly changing process but that it is a process whereby a balancing is made of the rights of the parties involved. The recent case of *Mitchell v. W. T. Grant,* 416 U.S. 600 (1974), reestablished the traditional balancing test approach to procedural due process cases. There this Court approved of the sequestration of household goods without a prior notice and hearing on the ground that the chance of errors was very minimal. This Court also held that a final judicial determination is not a prerequisite to a repossession by seller. This case certainly limited the impact of *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969), and *Fuentes v. Shevin,* 407 U.S. 67 (1972), with respect to the requirement that some sort of notice and opportunity to be heard must be given before property is taken. It is further true that the holding of the case of *Sniadach v. Family Finance Corp., supra,* regarding the need for a hearing has been construed as being not applicable to the assessment and collection of taxes. See *Fuentes v. Shevin, supra.*

B. The Petitioner Had Actual Knowledge That Not Only Were Taxes Falling Due with a Possible Loss of the Real Property for Failing to Pay Taxes, but He Had Actual Knowledge That the Property Was to Be Sold at a Tax Sale.

In making his Point II, petitioner has failed to point out the fact that he had actual personal knowledge that the property in question was going to be sold on a given day for delinquent taxes and that he had failed to take protective action inasmuch as he had relied upon the advice of his attorneys that the property could not be sold unless he had received actual written notice. Appendix "C-1,2."

In this case, petitioner was a person who had during his lifetime owned approximately 10 different parcels of real property in California, and was aware of the annual tax assessments; he also knew that the taxes on Lot 170 (the lot in question here) had not been paid from the time he had purchased the lot in 1966. (Appendix "A-7".) Finally, petitioner appears to argue that since the state had obtained a profit from the tax sale, petitioner was deprived of his property without just compensation. Such an argument is totally baseless as evidenced by the fact that the petitioner has failed to cite a single case to support his contention in this regard.

The law is clearly established that once the property is deeded to the state, the property owner forfeits all rights in the property except the privilege of redeeming it at any time before the state disposes of it. *Mercury Herald Co. v. Moore, supra,* 22 Cal.2d 269. The failure of the Legislature to provide for the return of the surplus funds to the delinquent taxpayer is not unconstitutional; that is, there is no constitutional duty to return the surplus. That has been the long-established law in this state. *Fox v. Wright,* 152 Cal. 59 (1907). Furthermore, as the Fifth Appellate District

of the Court of Appeal stated in its decision in the instant matter that "Since the state was the absolute owner of the property, there was no obligation to pay appellant the excess of the sales price over the tax liability." (Appendix "A-15.")

C. This Case Does Not Warrant Review by This Court

This Court and the California courts have clearly and succinctly answered the issue. The petitioner erroneously seeks to rely blindly upon the very general concept of due process of law as enunciated by this Court in the many cases decided by it. The petitioner also seeks to obfuscate the issues now by belatedly referring to out-of-state cases such as *Johnson v. Mock,* 19 Ariz.App. 283 (1973); *Ponder v. Ebey,* 152 P.2d 268 (1944); and *Rogers v. Dent,* 239 S.W. 1074 (1922), the facts of which are totally different from those in the present matter. On the basis of the facts presented, the California courts found that the procedures followed by the defendants accorded petitioner with all of the due process to which he was entitled.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

DATED:

Respectfully submitted,

EVELLE J. YOUNGER
Attorney General

CHARLES C. KOBAYASHI
Deputy Attorney General

Attorneys for Respondent State Controller, State of California

RUSSELL M. KOCH
Merced County Counsel

BLAIR H. CHECKETTS
Deputy County Counsel

Attorneys for Respondents County of Merced, Lynn Gresham and David R. Hudgins

Appendix "A"

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIFTH APPELLATE DISTRICT

5 Civil No. 2903
(Sup. Ct. No. 48331)

OPINION

Robert L. Chesney,
Plaintiff and Appellant,

v.

Lynn Gresham, as Tax Collector, etc., et al.,
Defendants and Respondents.

APPEAL from a summary judgment entered by the Superior Court of Merced County. Donald R. Fretz, Judge. Affirmed.

Gilbert Moody and Vernon Johnson for Plaintiff and Appellant.

Evelle J. Younger, Attorney General, Charles C. Kobayashi, Deputy Attorney General, Russell M. Koch, County Counsel, and Blair H. Checketts, Deputy County Counsel, for Defendants and Respondents.

Plaintiff and appellant, Robert L. Chesney filed this action against the State of California, the County of Merced, Lynn Gresham, as Tax Collector of the County of Merced, David R. Hudgins as Assessor of the County of Merced, and John Hovannisian to set aside a tax sale and deed to the State of California and a subsequent sale and deed of the

property to Hovannisian, and in the alternative for damages. The trial court granted the motion for summary judgment (Code Civ. Proc., § 437c) of the defendants State Controller, State of California, County of Merced, and David R. Hudgins as Assessor of the County of Merced.[1] Chesney has appealed from the summary judgment.

There is little conflict in the facts. However, since this is an appeal from a summary judgment, where such conflict appears in the papers submitted in support of and in opposition to the motion, we resolve those conflicts in favor of the nonmoving Party (appellant herein).

Appellant purchased and obtained title to Lot 170 of the Delhi State Land Development subdivision in Merced County in February 1966, that lot being the subject of this action. He has also owned Lot 168 in the same subdivision since 1965. Contemporaneously with the purchase of Lot 170, appellant purchased Lot 169 adjoining Lot 170 and put it in the name of Emma Robbins, whom appellant married in December 1974. He has lived on Lot 169 since September 1, 1973.

At the time of the purchase of Lot 170 the assessor's office records reflected appellant's address as 427 West Palmer, Glendale, California. In early 1968 appellant moved his business from 427 West Palmer Avenue and he has never received any of the tax bills or notices with regard to Lot 170 since that date.

As to Lot 168, he received tax bills and notices at his correct address, as did Emma Robbins with regard to Lot 169.

On October 9, 1970, appellant orally notified the assessor's office of his correct address for Lot 170. The assessor's office

1. Defendant John Hovannisian did not join in the motion for summary judgment and is not a party to this appeal.

records did not reflect such notification or change of address, and since their records continued to reflect the 427 West Palmer Street address for Lot 170 they continued to mail the tax bills and other notices to that address.

The county ad valorem taxes for the fiscal year 1967-1968 on Lot 170 were not paid, and after proper publication of notice (Rev. & Tax. Code,[2] §§ 3351, 3436) Lot 170 was sold to the state. The taxes remained delinquent for five years after the sale, and in accordance with statutory provisions Lot 170 was deeded to the state on July 3, 1973. (§§ 3361, 3365, 3517, 3518.) On October 29, 1973, Lot 170 was sold by the state at public auction to defendant Hovannisian for $9,600 plus $11 costs and was subsequently deeded to him. At the time of the sale the delinquent taxes and penalty on the property were in the amount of $2,468.43.

Prior to the deed to the state a notice of intended deed to the state was published pursuant to section 3361. The tax collector also sent a registered mail notice of the intent to deed to the state pursuant to section 3365.[3] When this

2. All references to code sections herein will be to the Revenue and Taxation Code unless otherwise indicated.

3. Section 3365 provides:

"After the first publication of the notice of intent to deed to the state and not less than 21 nor more than 35 days before the date of deeding, when tax-sold property is to be deeded, the tax collector shall send by registered mail to the last assessee of the tax-sold property at his last known address either a copy of the publication or a notice of intent to deed the property to the state. The tax collector shall make a reasonable effort to ascertain the address of the last assessee of the tax-sold property, including, but not limited to, an examination of the assessment of this property on the rolls beginning with the year of delinquency to and including that of the last equalized roll, an examination of the most recent telephone books in the county in which the tax-sold property is located, and an examination of the telephone book covering the area of the last known address of the last assessee.

"The failure of the tax collector to make a reasonable effort to ascertain the address of the last assessee as required by this section shall not affect the validity of the deed to the state."

notice was returned as undeliverable the tax collector checked through the records of the assessor's office for a better address but could find none.

Before the public auction resulting in the sale to respondent Hovannisian, in addition to the publication of notice thereof as required by section 3702,[4] the tax collector again sent registered mail notices of the sale of tax deeded property to occur at public auction on October 29, 1973. These notices were returned, and although the tax collector checked through the records of the assessor's office he could find no better address. Though not required by statute, on September 13, 1973, the tax collector also sent a notice of the intent to sell Lot 170 on October 29, 1973, to all adjoining lot owners. One of those was sent to Emma Robbins, who was listed as owner of Lot 169.

Appellant actually learned of the impending sale on Thursday, October 25, 1973, or Friday, October 26, 1973, when persons unknown to him came to Lot 170 to inspect the property in contemplation of submitting a bid thereon.

---

4. Section 3702 provides:
"The tax collector shall publish the notice of intended sale once a week for three successive weeks in a newspaper of general circulation published in the county seat and in a newspaper of general circulation published in the judicial district in which the property is situated. If the same newspaper of general circulation is published in both the county seat and in such district, or if the publication of the notice of sale is made in a newspaper which is determined pursuant to Section 3381 as most likely to afford adequate notice of the sale, publication in such paper shall satisfy the requirements for publication set forth in this section. If there is no newspaper published in the county seat or in the judicial district, then publication may be made by posting notice in three public places in the county seat or in the judicial district, as the case may be, where no such newspaper is published. The publication shall be started not less than 21 days prior to the sale."

Approximately two weeks following the sale appellant attempted to pay the obligation on Lot 170 in full to the tax collector, and it was properly refused. (§ 3707; *Mercury Herald Co. v. Moore* (1943) 22 Cal.2d 269, 273.)

During his lifetime appellant had owned approximately 10 different parcels of real property in California, was aware of the annual tax assessments and knew that the taxes on Lot 170 had not been paid since he purchased the lot in 1966. This fact did not concern him because he believed the property could not be sold without actual notice to him.

Two other statutory provisions have particular relevance to the issues herein. With regard to the deed to the state, section 3518 provides:

> "The deed, duly acknowledged or proved, is conclusive evidence, except against actual fraud, of the regularity of all other proceedings from the assessment of the assessor to the execution of the deed, both inclusive."

Relative to the effect of the deed to the purchaser at the public auction, section 3711 provides:

> "Except as against actual fraud, the deed duly acknowledged or proved is conclusive evidence of the regularity of all proceedings from the assessment of the assessor the execution of the deed, both inclusive."

The nuclei of appellant's contentions are that (1) the tax collector did not comply with the requirements of sections 3365 and 3701 because the registered mail notice was not sent to appellant's correct address which the assessor had been told about, (2) because appellant was the owner of an adjacent lot, No. 168, and the correct address appeared as to that lot, the tax collector must not have made a reason-

able effort to ascertain his last address,[5] and (3) the validating provisions in the last paragraph of sections 3365 and 3701 and those contained in sections 3518 and 3711 are invalid as being a violation of due process inasmuch as they purport to authorize the sale of Lot 170 without actual notice to the owner, in violation of the owner's constitutional due process rights.

We start with the last point first since if the requirement of notice by registered mail "could have been omitted by the legislative body in the first place, then a failure to comply with it is not jurisdictional. . . ." (*McMaster v. City of Santa Rosa* (1972) 27 Cal.App.3d 598, 603.) To elaborate, sections 3518, 3711, 3365 and 3701 cannot cure a jurisdictional defect, that is, one which is a constitutionally indispensable step. (*Miller v. McKenna* (1944) 23 Cal.2d 774, 782; *Ramish v. Hartwell* (1899) 126 Cal. 443, 449; *Philbrick v. Huff* (1976) 60 Cal.App.3d 633, 641.) Alternatively, those sections do cure a nonjurisdictional defect. (*Philbrick v. Huff, supra,* 60 Cal.App.3d 633, 640; *Nutting v. Herman Timber Co.* (1963) 214 Cal.App.2d 650, 656; *Bell v. Towns* (1949) 95 Cal.App.2d 398, 400-401.) Thus, *Philbrick v. Huff, supra,* 60 Cal.App.3d 633, 640, citing *Nutting v. Herman Timber Co., supra,* 214 Cal.App.2d 650, 656, states: "A defect in a tax proceeding is not jurisdictional where it 'has been for nonobservance of some procedural notice or other step which the Legislature, without defiance of state or federal Constitution, might have dispensed with altogether.'" (See also *Paul v. Los Angeles County Flood Control Dist.* (1974) 37 Cal.App. 3x 265, 273-275.)

5. In this connection it must be noted that these sections literally require the search of the assessor's records only with regard to "this property," not all property or lots on the rolls of the assessor, the latter obviously being a burden beyond the resources of the assessor.

Thus, in determining whether or not failure of respondent to send tax bills and notices of delinquency to appellant's proper address is jurisdictional, it must be determined whether direct mail notice is necessary to satisfy appellant's rights to constitutional due process.

> "It is, of course, a well-established principle that a person's property may not be taken from him without due process of law and that a fundamental requisite of due process is notice, reasonably calculated, under all the circumstances to apprise the interested parties of the pendency of proceedings which could result in a deprivation of a person's property so as to afford him an opportunity to be heard. [Citations.]" (*Philbrick v. Huff, supra,* 60 CalApp.3d 633, 641.)

In the seminal case of *Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 315 [70 S.Ct. 652, 657], the United States Supreme Court concluded:

> "The means employed [to give notice to interested parties] must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected. . . ."

In *Mullane,* the court held mere publication of notice to the beneficiaries of a trust fund whose names and addresses appeared on the trustee's books was insufficient to satisfy due process. As to those beneficiaries, the trustee was required to provide notice by mail. (*Mullane v. Central Hanover Tr. Co., supra,* 339 U.S. at p. 318.)

The case makes clear, however, that actual notice need not be shown to satisfy the requirements of due process. It states:

> "The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand." (*Mullane v. Central Hanover Tr. Co., supra,* 339 U.S. 306, 319.)

A long line of California cases has held in tax sale situations "publication of notice is all the 'due process' notice to which the delinquent taxpayer is entitled, and that '[a]s far as the mailing of additional notices of sale prior to the sales to and from the State, or the mailing of any additional notices at all is concerned, such notices could have been done away with or not required by the legislature in the first instance without doing violence to due process.' (182 P.2d 280, 283.)" (*McMaster v. City of Santa Rosa, supra,* 27 Cal.App.3d at p. 605; see also *Merchants' Trust Co. v. Wright* (1911) 161 Cal. 149, 150; *Bank of Lemoore v. Fulgham* (1907) 151 Cal. 234, 239-240; *Philbrick v. Huff, supra,* 60 Cal.App.3d at p. 642; *Westinghouse Elec. Corp. v. County of Los Angeles* (1974) 42 Cal.App.3d 32, 42-44; *Litchfield v. County of Marin* (1955) 130 Cal.App.2d 806, 816-816.) The theory underlying this conclusion is apparently that annually assessed ad valorem property taxes are well known to the property owner and therefore he has an obligation to be on alert to protect his rights against delinquency concerning those taxes. (*Philbrick v. Huff, supra,* 60 Cal.App.3d at p. 647.) This theoretical basis is consistent with the above quoted portions of *Mullane*. The very nature of annually assessed ad valorem property taxes is such that a property owner is already on notice that he should be receiving a bill every year in the mail and that if he does not the taxes will become delinquent and the property might be sold to the state to satisfy them. This

sharply contrasts with the situation in *Mullane* in which the known beneficiaries, particularly those who lived outside New York, had no reason to be alert to protect their rights with regard to the trust fund there involved. (*Sears v. County of Calaveras* (1955) 45 Cal.2d 518, 521-522.)

Appellant places reliance upon this court's recent decision in *Johnson v. Alma Investment Co.* (1975) 47 Cal.App.3d 155. *Johnson,* however, is distinguishable from the case at bar because *Johnson* involved an irregular assessment by a local water storage district. Unlike with the annually assessed ad valorem property tax, there was no reason for the property owners in *Johnson* to be on guard to protect their interests. Consequently, this court held due process was not satisfied in the water storage district's failure to utilize the address of the property owner which was readily available from both the tax assessor and tax collector to provide direct mail notice. Footnote 3, page 160, of the *Johnson* opinion implicitly supports the very distinction here made between the *Johnson* situation and the case at bar. Likewise, in the recent case of *Philbrick v. Huff, supra,* 60 Cal.App.3d 633, the Court of Appeal of the First Appellate District employed the same distinction between annually assessed ad valorem property taxes and special water district assessments. (*Id.* at p. 646.) Thus, the court in *Philbrick* concluded direct mail notice was not required under the same tax sale procedures that are involved herein to satisfy due process and that publication of notice was all that was required.

Thus, consistent with the foregoing authority, the conclusion is inescapable that in the instant case appellant has been provided the entirety of his due process rights by the uncontroverted evidence that respondents gave notice by publication prescribed in the tax sale statutes.

Appellant argues that since the last sentence of sections 3365 and 3701 was added in 1971 and the default and sale to the state of Lot 170 took place before that date, these sections could not be legally applied to Lot 170. However, since these sections were not invoked by the taxing authority until 1973, the amendments were properly applied to this case. Moreover, both the duty to make a reasonable effort to locate the address of the last assessee and the relief from that duty were placed in the sections by amendment at the same time. The situation is not one where a right has been created by legislation and then sometime later the procedure for obtaining relief with regard to that right is eliminated. Properly viewed, the Legislature is fully within its power to set forth the right or duty in a statute and limit it at the same time in any way it chooses so long as it is not under a constitutional compulsion to leave that right unrestricted. There is no such constitutional compulsion in this case.

Appellant further urges that the issue of fraud is a question of fact. (Civ. Code, § 1574.) It is first to be noted that the curative effect of sections 3518 and 3711 can be avoided only by actual fraud, constructive fraud being expressly eliminated as a basis for relief by those sections.

While some of the allegations of appellant's complaint may be construed as an effort to plead actual fraud, appellant cannot use his own pleading to oppose a motion for summary judgment. (Code Civ. Proc., § 437c; *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 148; *Dugar v. Happy Tiger Records, Inc.* (1974) 41 Cal.App. 3d 811, 818.) There is not a hint or suggestion of actual fraud in the other papers submitted in opposition to the motion. Moreover, respondents in their memorandum of points and authorities filed in support of their motion for summary

judgment in the trial court indicated appellant conceded at the pretrial conference that there were insufficient facts to establish actual fraud. In his response to the motion for summary judgment, appellant did not deny this concession and solely argued constructive fraud. Likewise, he expressly argued constructive fraud only in his opening brief in this court. From this it must be concluded appellant waived the contention, now weakly argued, that there is a triable issue of fact with regard to actual fraud.

Lastly, appellant seeks to recover the excess of the sales price of the property over the tax liability. However, by allowing taxes to become delinquent for a period of over five years and the property having been deeded to the state, appellant forfeited any property interest in the property or the proceeds from the sale. In exercising its sovereign power as owner of the property free and clear of any interest in the taxpayer, the state may sell the property for whatever amount it will bring on the open market to the highest bidder, even if that amount exceeds the amount of the tax liability, or sell the entirety of the property where the sale of only a parcel of it would satisfy the tax obligations. Since the state was the absolute owner of the property there was no obligation to pay appellant the excess of the sales price over the tax liability. (*Mercury Herald Co. v. Moore, supra,* 22 Cal.2d 269, 272; *South San Joaquin Irr. Dist. v. Neumiller* (1935) 2 Cal. 2d 485, 489; *Jordan v. Beale* (1916) 172 Cal. 226, 228; *Furrey v. Lautz* (1912) 162 Cal. 397, 399; *Merchants' Trust Co. v. Wright, supra,* 161 Cal. at p. 150; *Chapman v. Zobelein* (1912) 19 Cal.App. 132, 134 (affd. at 237 U.S. 135).)

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

(Brown)

.....

P.J.

WE CONCUR:

(Thompson)

.....

J.*

(Goldstein)

.....

J.*

*Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.

Appendix "B"

CALIFORNIA REVENUE AND TAXATION CODE

Section 2609. (Notice of due and delinquency dates, penalties, etc.)

On or before the day when taxes are payable the tax collector shall publish a notice specifying:

(a) The dates when taxes on the secured roll will be due.
(b) The times when these taxes will be delinquent.
(c) The penalties and costs for delinquency.
(d) That all taxes may be paid when the first installment is due.
(e) The times and places at which payment of taxes may be made.

Section 2610: (Notice of due and delinquency dates, penalties, etc; publication; posting)

The notice shall be published once a week for two weeks in a newspaper, if there is one published in the county, or, if none, by posting it in three public places in each township.

Section 2610.5 (County tax bill; annual mailing; failure to receive bill)

On or before November 1 each year, the tax collector of every county shall mail a county tax bill or copy thereof to each assessee or fee owner of property on the secured roll. This requirement need not be met where the computation of taxes results in a zero amount. The failure to receive a tax bill does not relieve the fee owner from the liability to pay taxes owed, nor does it relieve the imposition of penalties imposed by this code.

Section 2611. (Tax bills; notice of penalties)

A notice shall be printed on all tax bills specifying that if taxes are unpaid, it will be necessary as provided by law to pay:

(a) Delinquency penalties.
(b) Costs.
(c) Redemption penalties.
(D) Redemption fee.

Section 2612. (Tax bills; tax sold separately; notice of sale)

On the tax bill for tax-sold property shall appear in writing the fact that it has been sold for delinquent taxes. In the alternative the tax bill may contain language such as "property sold to state for unpaid prior year taxes," "sold to state due to delinquent prior year taxes," or any other language which would indicate the fact the property has been sold to the state and there are delinquent prior year taxes.

Section 3351. (Notice of intention of collector to sell; publication)

Annually, on or before June 8th, the tax collector shall publish a notice of his intent to sell to the state the real property, except tax-sold property and possessory interests, the taxes, assessments, penalties, and costs on which will have not been fully paid at the time set for the sale.

Section 3365. (Mailing copy of publication or notice to last assessee)

After the first publication of the notice of intent to deed to the state and not less than 21 nor more than 35 days before the date of deeding, when tax-sold property is to be deeded, the tax collector shall send by registered mail to the last assessee of the tax-sold property at his last known address either a copy of the publication or a notice of intent to deed the property to the state. The tax collector shall make a reasonable effort to ascertain the address of the last assessee of the tax-sold property, including, but not limited to, an examination of the assessment of this property on the rolls beginning with the year of delinquency to and including that of the last equalized rool, an examination of the most recent telephone books in the county in which the tax-sold property is located, and an examination of the telephone book covering the area of the last known address of the last assessee.

The failure of the tax collector to make a reasonable effort to ascertain the address of the last assessee as required by this section shall not affect the validity of the deed to the state.

Section 3701. (Authorization by Controller; notice to last assessee; address)

After receiving the written authorization of the Controller and not less than 21 nor more than 28 days, before the proposed sale, the tax collector shall send a notice by registered mail of the intended sale to the last assessee of each portion of the property at his last known address. The tax collector shall make a reasonable effort to ascertain the address of the last assessee of the tax-deeded property, including, but not limited to, an examination of the assessment of this property on the rolls beginning with the year of delinquency to and including that of the last equalized roll.

The failure of the tax collector to make a reasonable effort to ascertain the address of the last assessee as required by this section shall not affect the validity of the sale.

Section 3807. (Redemption right, termination; interest conveyed)

If not previously terminated, all rights to redeem the property from sale to the State are terminated on the date upon which the application for the deed is received or on the date upon which the payment of the purchase price is received in compliance with the terms of the agreement. The deed conveys to the purchaser all the State's interest in the property.

Appendix "C"

The following represents pages 21 and 24 of the Clerk's Transcript of Deposition on Appeal as filed with the Fifth District Court of Appeal in the subject matter.

other anyway.

Q. On the Robbins property, that went delinquent?

A. It was delinquent.

Q. Did you get—

A. For several years.

Q. Did you get notice of that property going delinquent?

A. Oh, yes.

Q. And—

A. Put it on a five year plan.

Q. Why were you concerned about this property going delinquent and not the others?

A. Well, you've got to try to catch up somewhere, don't you?

Q. As I understand, this Robbins property was purchased after the lot 170, is that correct?

A. Yes.

Q. So you knew that the taxes were not being paid on the lot 170 as you stated?

A. I knew they hadn't been paid for some time, yes.

Q. So wouldn't you know that the taxes were due for a longer time on lot 1970 than the Robbins property?

A. No; I wasn't familiar with it because I wasn't taking care of it at the time.

Q. I think you stated that you started taking care of it in 196—in November?

A. '68, after '68.

Q. So you were aware of it from that time, is that correct?

A. Well, what there was, yeah.

many pieces of property do you think you have owned?

A. Approximately ten.

Q. Have you been delinquent on the payment of taxes on any of those properties other than the properties we have mentioned previously?

A. Delinquent?

Q. Yes.

A. I have been a little late.

Q. Have you ever lost any pieces of property in a tax sale previously?

A. No.

Q. Now, you indicated a few minutes earlier that when you came down to the Merced office and talked to Mrs. Twomey, she would not accept $500.00 as a part payment; is this correct?

A. That is right.

Q. Now, did you also state that you concluded at that time that in any event the sale would not be legal?

A. That's right.

Q. And on what basis did you come to this conclusion?

A. Because I wasn't notified.

Q. Who advised you of the fact or the intention that you had to be notified prior to the sale?

A. Two lawyers in Los Angeles.

Q. And you depended upon their advice?

A. Absolutely.

Q. Did you apprise these lawyers of all the facts underlying this particular situation?

A. No; it's just absolutely law. I read it myself.

Q. Now, going back to your financial affairs, what were

Appendix "D"

CHAPTER 614

An act to validate certain acts of taxing agencies and revenue districts and of their officers, relating to property taxation.

[Approved by Governor September 18, 1973. Filed with Secretary of State September 18, 1973]

The people of the State of California do enact as follows:

SECTION 1. As used in this act "taxing agency" includes the state, county, and city. "Taxing agency" also includes every district that assesses property for taxation purposes and levies taxes or assessments on the property so assessed.

SEC. 2. As used in this act "revenue district" includes every city and district for which the county officers assess property and collect taxes or assessments.

SEC. 3. Every act and proceeding heretofore taken by any taxing agency or revenue district or the officers thereof relative to preparing, transmitting, computing, determining or fixing the budget or the tax rate or rates of any taxing agency or revenue district, or to the assessment or equalization of property or to the levy of taxes thereon or to tax sales or certificates of tax sales, tax deeds or other conveyances, are hereby confirmed, validated and declared legally effective.

SEC. 4. (a) This act is limited to the correction of defects, irregularities and ministerial errors which the Legislature originally could have omitted from the statutory requirements of law under which the acts hereby confirmed, validated and declared legally effective were taken.

(b) This act is limited to the validating of acts and proceedings to the extent to which the same can be effectuated under the State and Federal Constitutions.

(c) This act shall not operate to confirm, validate, or legalize any act, proceeding or other matter the legality of which is being contested or inquired into in any legal proceeding, now pending and undetermined or which may be pending and undetermined during the period of 30 days from and after the effective date of this act, and shall not operate to confirm, validate, or legalize any act, proceeding or other matter which has heretofore been determined in any legal proceeding to be illegal, void or ineffective.

(d) Nothing in this act shall operate to make valid any property tax rate which is in excess of that permitted by law.

SEC. 5. If any provisions of this act or its application to any person or circumstances are held invalid, the remainder of the act and the application of its provisions to other persons or circumstances is not affected.